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Supreme Court, U.S.
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No. 98-1320

In The

Supreme Court of the United States

October Term, 1998

BSW DEVELOPMENT GROUP,

Petitioner,

vs.

CITY OF DAYTON, OHIO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Ohio

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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THERE ARE TWO KEY ELEMENTS FROM WHICH THE CITY CANNOT ESCAPE: (1) ITS PERMIT DENIAL WAS HELD TO BE ILLEGAL, AND (2) THE SPECIAL MASTER WAS DIRECTED *ONLY* TO DETERMINE WHETHER THAT DENIAL PREVENTED *ALL* USE. CERTIORARI IS AMPLY WARRANTED.

With a blizzard of factual minutiae, the City's Brief in Opposition seeks to becloud the straightforward issues presented by the Petition. But there are two key elements that cannot be hidden – and they are determinative.

First, the Ohio courts examined the City's permit denial and found it illegal. The trial court held the entire scheme unconstitutional. As that court put it:

> "When the Ordinance was enacted, BSW's building was considred (sic) to have no historical signifigance (sic) for the City. The area was rejected as a historical district several years earlier. The City, without notice or consent, made the building eligible for historic status. Under the Ordinance, BSW is now faced with a *million dollar renovation with no expectation of any return.*
>
> "The actions of the Landmark commission and BZA . . . have denied BSW due process and equal protection of the laws." (App., p. 68; emphasis added.)

The Court of Appeals accepted the trial court's finding of the horrendous economic burden placed by the City on BSW and agreed that the demolition permit denial was illegal. (App., pp. 58-59.) Because of the substantial costs involved, the appellate court found it unnecessary to rule on the constitutional issues. (App., pp. 57-58.)

The key here is that, until reversed in the first round of litigation, the City's ordinance froze BSW in place. It could not evade the ordinance, because the ordinance was still in force until struck down. And it could not comply with the ordinance because that would have been financially ruinous.

The City's action was illegal. The problem is legal, not factual. In the decisions brought here for review, the only issue considered below *should have been* the *amount* of compensation needed to make BSW whole for the taking that occurred while the invalidity of the ordinance was being litigated. Instead, the Ohio courts focussed on the question of whether BSW was entitled to relief at all. That was error. And that holding, as shown in the Petition, conflicts with the decisions of courts in other states on an issue that demands national uniformity because of its 5th Amendment roots.

Second, in determining whether the City had taken BSW's property, the Court of Appeals was extremely specific in what it instructed the Special Master to do. He was limited to examining one question, because the Court of Appeals believed that one question was the determinative issue in whether a temporary taking had occurred. The Court of Appeals instructed the Special Master to answer only the following query:

> "Whether the city's 1989 denial of a demolition permit deprived BSW of ***all use*** of its property." (App., p. 53; emphasis added.)

That court gave that instruction because it believed that for a temporary taking this Court required a denial of ***all use***. Plainly, that is erroneous. As the City knows,

the Special Master *should have been instructed* to determine whether the City's action denied BSW the economically viable or beneficial or productive use of its property. Just as plainly, there is conflict in the state courts on the proper standard by which to determine the existence of a temporary taking. Because of the need for national uniformity on this issue (aside from the gross injustice to BSW), this Court's attention is needed.

BSW prays that a writ of certiorari issue to review the decisions below.

Respectfully submitted,

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